Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HAROLD W. STONE AND IRIS STONE,

Petitioners,

v.

CITY OF LYNN AND KEVIN R. GEANEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS SUPREME JUDICIAL COURT.

PETITION FOR A WRIT OF CERTIORARI.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented for Review

Whether the City of Lynn constructively took plaintiffs' property in violation of the Fifth and Fourteenth Amendments of the United States Constitution, either through physical invasion or regulatory taking, during all or any part of the time period of 1985- 1992.

Whether plaintiffs' claim that the City of Lynn constructively took their property in violation of the Fifth and Fourteen Amendments of the United States Constitution was ripe for review.

Whether any part of plaintiffs' claim that the City of Lynn constructively took their property in violation of the Fifth and Fourteen Amendments of the United States Constitution and/or in violation of their right to substantive due process was barred by the applicable statute of limitation, or, in the alternative, whether the City of Lynn waived its statute of limitations defense.

Whether the City of Lynn deprived plaintiffs of their right to substantive due process.

Whether the Stones can bring their constructive taking claim under 42 U.S.C. § 1983.

List of Parties

The caption of the case contains the names of all parties. None of the parties to this action are corporations.

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Opinion Below

The Opinion of the Massachusetts Appeals Court is unreported and is set forth as Appendix "A" to this Petition. App., *infra*, A1-A17. The Massachusetts Supreme Judicial Court's Denial of Harold and Iris Stone's Petition for Further Appellate Review is unreported and is set forth as Appendix "B" to this Petition. App., *infra*, A18 -A19. The Trial Court's Memorandum of Decision And Order on Defendant's Motion for Partial Summary Judgment is unreported and is set forth as Appendix "C" to this Petition. App., *infra*, A20-A37. The Trial Court's Order on Defendant City of Lynn's Motion for Judgment Notwithstanding the Verdict is unreported and is set forth as Appendix "D" to this Petition. App., *infra*, A38-A40.

Jurisdiction

The Judgment of the Massachusetts Appeals Court was issued on September 26, 1997. The Massachusetts Supreme Judicial Court denied Plaintiffs-Appellees Petition for Further Appellate Review on November 25, 1997. App., *infra*, A18-A19. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(a).

United States Constitutional Provisions and Local Ordinances Involved

The Fifth Amendment of the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment of the United States Constitution, Section is set forth in Appendix "E", *infra*, A41.

42 U.S.C. § 1983 is set forth in Appendix "E", *infra*, A41-A42.

Sections 4 and 12 of the City of Lynn Zoning Ordinance are set forth in Appendix "E", *infra*, A42-A51.

Statement of the Case

Facts

The Plaintiffs Harold and Iris Stone ("the Stones") are former owners of real property situated at 260, 270 and 276 Lynnway, Lynn, Massachusetts ("the Property").

In or about 1978, the defendant the City of Lynn decided to develop a part of the City's waterfront, which included plaintiffs' Property. In the center of the development, the City proposed building an area to be known as Heritage State Park. The City proposed building a development to be named Seaport Landing to be located east of Heritage State Park. The City proposed building a development named Harborside Landing to be located south of the Park. The City viewed the Harborside Landing development as a "continuation" of the Seaport Landing project. Harborside Landing encompassed eleven acres, including the one acre of Property which the plaintiffs owned, and was to be developed in a similar manner as Seaport Landing, i.e. condominiums, commercial space, and a public marina and public walkway by the sea.

The City acquired by eminent domain the property on which Seaport Landing and Heritage State Park were to be built paying approximately $8 million in just compensation for the property.

Condominium units with commercial/retail space and a public marina were actually built on the Seaport Landing site.

On October 2, 1985, the Mayor of the City of Lynn, two City Councilors and private developers Paul Varadian and Irwin Nebelkopf (hereafter "the developers") held a press conference to announce the specific plans for Harborside Landing. Varadian and Nebelkopf had developed Seaport Landing and had been selected by the City of Lynn to develop Harborside Landing as well.

Harold Stone operated Ben's Tire, a family tire business, on the Property. On May 1, 1983, Harold Stone had obtained a special permit to operate an auto repair shop with storage of inflammables on the Property. Although profitable in the early 1980s, business at Ben's Tire began to decline in the latter part of 1984 and all of 1985. The testimony was uncontradicted that the business was profitable until the City announced its plans to develop the Stone's property and that the City of Lynn's plans for their Property to become part of the Harborside Landing project was the major cause for the decline in business, as customers and employees left to go elsewhere.[1] On November 5, 1985, Stone auctioned off the company's assets and Ben's Tire effectively ceased to exist.

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1. The Appeals Court Opinion discounts this testimony as the Court inaccurately notes that "[t]he development project was not announced until October, 1985, and Stone testified that his business had been unprofitable from the 'early 80's' on." App., *infra*, A8, n. 7. In fact, as noted above, plans for the project were revealed in 1978, followed by the actual construction of Seaport Landing. In October 1985, the City announced that Nebelkopf and Varadian would be the developers of the second phase of the project and revealed the specific plans put together by the selected developers and the City.

Although the Stones' property was on the major thoroughfare in the City of Lynn, the only interested buyer of the Stones' property was the developer selected by the City of Lynn to develop the Harborside Landing Project on the Stones' property.

Prior to the end of 1985, the Stones met with William Kyriakakis, the Executive Director of the Lynn Economic Development Investment Corporation ("EDIC"), and asked him what they could do. Mr. Kyriakakis told them that their Property was part of the Harborside Landing project, "you have no choice, . . . -- you're going to sell to the developers, . . . I know it's not fair; but that's the way it is and don't expect to get rich on it."

On April 22, 1986, the defendant City Planner Kevin Geaney informed the defendant Lynn City Council in writing that Varadian and Nebelkopf would be the developers of Harborside Landing. He indicated that the public area proposed for the Harborside project was "extremely large - encompassing . . . 58.5% of the total site." He further indicated that the project was being funded 100% with private funds.

The City retained extensive involvement in the project, making hundreds of recommendations to the developers, all of which were accepted.

The Lynn Zoning Ordinance provided the City of Lynn with the means to assure that the Property could not be sold to anyone other than the developer whom the City had selected. The Property was located in a "Heavy Industrial" zoning district. During the period of October 2, 1985 through April 26, 1991, Section 4 of the Lynn City Zone Ordinance provided that no commercial activity could be conducted as a matter of right in

a "Heavy Industrial" district and that a special permit was required for any proposed commercial use. The City of Lynn had been informed on at least two occasions that their zoning ordinance was probably illegal.[2]

On July 24, 1986, the Stones, having been coerced to sell their property to the developers as only the developers could obtain a special permit needed to do business on the Stones' property, gave into the inevitable and sold their Property to the developers for $400,000 in cash with the Stones taking back a second mortgage on the Property for $325,000.[3] The developers signed a Promissory Note in which they agreed to

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2. The Appeals Court concluded that "[t]he evidence of the city's supposed knowledge of illegality was based upon the testimony of a private city planning consultant (who was not a lawyer), over objection, that he had concluded the ordinance 'might' be illegal sometime in 1984 or 1985 and communicated his views at some sort of meeting with city officials." App, *infra*, A8, n.8. The testimony to which the Appeals Court refers was the testimony of John Connery, in which he indicated that in the spring of 1985, he met with City of Lynn officials, including defendant Geaney and members of the City Council, and informed them that a zoning ordinance similar to the Lynn Zoning Ordinance had been found to be illegal in the case of SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101 (1984), as it gave too much discretion to city officials and allowed for arbitrary decision-making.

The Appeals Court completely disregards the uncontradicted testimony that in or about 1988 or 1989, Assistant City Solicitor Michael Barry expressed his opinion to the Lynn City Council that the Lynn Zoning Ordinance requiring a special permit for all uses in a Heavy Industrial area was illegal, and that in response, a City Councillor stated that he and the rest of the Council believed that it was good for the City to have that kind of control and he did not care if it was strictly legal or not.

3. The Stones only realized $450,781.25 from the sale, as the City-selected developer defaulted after making only five interest payments.

make twelve quarterly interest payments of $10,156.25 with the face amount of the note due on July 24, 1989. The Stones offered expert testimony that on July 24, 1986, the fair market value of the Property was $1 million.

On November 18, 1986, the Lynn City Council granted the developers a special permit to build the Harborside Landing project. The special permit provided for the development of eleven acres on which 340 condominium units would be built.

The developers, in fact, never commenced development of the Harborside Landing project, as the condominium market "dried up".

In 1989, the Stones commenced foreclosure proceedings against the developers. On June 7, 1989, the Stones repurchased the Property at auction.

After the Stones executed a purchase and sale agreement to sell the Property for $890,000, Geaney told the attorney for the prospective buyer that he would not recommend use of the Property in any manner other than in accordance with the special permit granted the developers. He indicated that he considered the area to be a singular project because the special permit obtained by the developers was still in force in his opinion and was for the entire site. As the special permit called for the development of 340 condominium units on 11 acres, this decision in effect precluded the Stones from selling their one acre of property. The prospective buyer withdrew his offer.[4]

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4. The attorney for the buyer testified that it was his experience from prior occurrences that the Lynn City Council always deferred to Mr. Geaney's recommendation on special permit matters. Geaney testified that he could recall only two occasions in nineteen years that he had been City Planner that the City Council did not follow his recommendation. He could not

On August 16, 1989, the Stones entered into a Purchase and Sale Agreement with Kenneth Trapasso, a used car dealer, agreeing to sell the Property for $920,000. The sale was contingent upon Trapasso obtaining a special permit for use of the Property.

On September 12, 1989, Trapasso applied for a special permit to use the Property for Auto Sales and Repair & Body with Storage of Inflammables.[5] On October 24, 1989, a hearing was held on the request for the special permit. Trapasso and the Stones were never notified that Trapasso's request for a special permit was going to be heard by the City Council on the hearing date. The City Council voted 11-0 on the merits (as opposed to any procedural grounds such as abandonment of the claim) against granting the special permit, declaring that the requested auto-related use would be "unsafe, unattractive and inappropriate for the area", and "a detrimental impact on the City or the neighborhood can be envisioned".

Although the Stones had lowered their asking price to $400,000, they were unable to find an interested buyer despite contacting numerous brokers and potential buyers.

On March 13 1992, the First Colonial Bank foreclosed on the Property as the Stones had run out of money to meet their debt obligations.

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recall a single instance when the Planning Board did not accept his recommendation regarding whether or not to support a special permit.

5. In other words, Trapasso sought a special permit for the same purposes for which te Stones had been granted a special permit in 1983, which permit the City claimed at trial ran with the land.

The City of Lynn's actions financially ruined the Stones. In 1985, after the Stones sold the assets of Ben's Tire, they owned their house free and clear and owned property on the Lynnway valued at close to $1 million on which they carried a mortgage of approximately only $180,000. After the foreclosure in 1992, the Stones owed the bank a $390,000 deficiency judgment and carried a $95,000 mortgage on their home with a balloon payment due shortly. Neither Harold nor Iris Stone can work because of the emotional distress they have suffered and most of their social security benefits go to make the monthly mortgage payment on their house.

There was uncontradicted testimony of two psychiatrists as well as the testimony of the plaintiffs which detailed the severe emotional distress that the Stones have experienced. Harold Stone suffers from post traumatic stress disorder. The principal symptoms include flashbacks, rage episodes, sleep disturbances, and numbing.

Iris Stone suffers from a panic disorder with agaraphobia (the fear of having other panic attacks in a place where no one can help you). The attacks are characterized by a sudden onset of dizziness, a feeling of not being able to breathe, queasiness and terror. She began to see a psychiatrist in the spring of 1989 following Geaney's seeking to close the curb cuts to the Property, Geaney's telling people they couldn't have the Stone's Property and the discovery that the City had taken the water pipes away from their Property.

Timely Presentation of Federal Question

This case is founded on the consolidation of two different Complaints. In the first Complaint, plaintiffs both alleged that their property had been taken without just compensation and that they were entitled to damages under 42 U.S.C. § 1983. App., *infra*, A20-A21. In the Second Complaint, in Count III the Stones alleged that defendants's actions "constitute a taking of the plaintiffs' property without just compensation under the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteen Amendment." In Count VI, the Stones alleged violations of 42 U.S.C. § 1983. App., *infra*, A30, n.5 (Grasso 71-11). In Count VII, the Stones alleged that the City acted arbitrarily and capriciously in violation of United States law. *Id.* On March 3, 1995, Superior Court Judge Grasso granted defendant Lynn's Motion for Summary Judgment on the Stone's claims that defendant had violated 42 U.S.C. § 1983 by its violation of the Stone's constitutional right to substantive due process. The jury awarded the Stones $310,000 in damages as "the just compensation that the Stones should be paid by the City of Lynn for the constructive taking of their property."[6]

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6. In addition, the jury awarded another $400,000 to the Stones because of defendants' negligent infliction of emotional distress. The Appeals Court overturned all damage awards to the plaintiffs.

The Stones presented to the Appeals Court for its review issues relating to the constructive taking of its property as well as alleged violations of substantive due process.[7]

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7. The Appeals Court erroneously concluded, that the statute of limitations had run on the Stones' claim that a constructive taking occurred during 1985 and 1986. Two Superior Court judges had independently ruled to the contrary. Defendants failed to file an answer to plaintiff's amended complaint in the first action, never raised the statute of limitations defense by way of answer to the first action, and in fact never raised this argument until after the case had already been tried once and remanded after an appeal. Moreover, a Massachusetts statute (Mass. Gen. Laws c. 79 § 10) provides that inverse condemnation actions need not be brought until one year of the date of the completion of the public improvement: in this case, the improvement was never completed and at the earliest it might be argued that the improvement was completed on the date on which plaintiffs foreclosed on the developers on July 11 1989 (i.e. 4 months prior to the date on which the action was brought). Morever, the Stones brought their claim in state court alleging an inverse condemnation under state law and a taking under federal law approximately one month after the denial of the special permit to Kenneth Trapasso. As the statute of limitations for a constructive taking does not accrue until it has been determined that bringing a state action is futile, Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 687 (9th Cir. 1993), cert. den. 510 U.S. 1093 (1994), the statute of limitation on the federal claim did not even accrue until after the Appeals Court decision in this case denying plaintiff's inverse condemnation claim. Cf. United States v. Dickinson, 331 U.S. 745, 749, 91 L. Ed. 1789, 67 S. Ct. 1382 (1947) (a landowner may "postpone suit until the situation becomes stabilized.")

More significantly for purposes of this Petition, "[t]he question of when a cause of action accrued is a matter of federal law." Street v. Vose, 936 F.2d 38, 40 (1st Cir. 1991), cert. den. 510 U.S. 1093 (1992). See, also, Corn v. City of Lauderdale Lakes , 904 F.2d 585, 588 (11th Cir. 1990), cert. den. 511 U.S. 1018 (When cause of action accrues governed by federal law in constructive taking case). Thus, the statute of limitation defense does not raise any independent state ground on which this case can be decided. Moreover, the statute of limitation defense does not even relate to plaintiff's claim of a continuing taking from 1985-1992 or a second taking from 1989-

Reasons for Granting the Petition

I. CONSTRUCTIVE TAKING CLAIMS

A. This Case Raises the Important and Unanswered Question of Whether the Government Must Pay Full Compensation for Public Improvements That it Seeks to Undertake Through Private Development.

As defendant Geaney testified at trial, the City wanted to remain a part of every facet of the development of its shoreline property, except it did not want to pay for it. Consequently, the City of Lynn selected a developer for a public project which was to be located on the Stones' property, announced that it would pay no public funds for this public project, informed the Stones that they had no choice but to sell to that developer and left the Stones with no choice but to sell to the developer by enforcing an illegal zoning ordinance requiring a special permit for all commercial uses.

The Appeals Court dismissed the Stones' claim summarily declaring in one sentence that "no case authority comes anywhere close to suggesting that a taking could have occurred on the sparse facts presented by the Stones," and citing cases to the effect that "the mere assertion of regulatory jurisdiction by a government body does not constitute a regulatory taking" and "mere announcements of proposed land taking for urban renewal purposes do not amount to a compensable taking." App., *infra*,

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1992.

A7. In other words, the Appeals Court ended its analysis where it should have begun its analysis. The Appeals Court failed to discuss the fact that the City did not "merely" announce its proposed land taking, but it selected the developer and utilized an illegal zoning ordinance to coerce the Stones to sell to that developer at less than fair market value. The court did not mention even once in its opinion the "Seaport Landing Project", despite the fact that the Harborside Landing Project (for which the Stones' property was taken) was a continuation of the Seaport Landing Project for which the land was taken by eminent domain and for which the landowners received just compensation. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1035-1036 (1992) (Kennedy, J., concurring) (different treatment of neighboring properties "must be measured in [the] balance").

Although the Appeals Court declared that no case authority comes anywhere close to suggesting that a taking could have occurred in this case, in fact, in Amen v. City of Dearborn, 718 F.2d 789, 797 (6th Cir. 1983), the court declared that where the City of Dearborn "made clear its intent to . . . redevelop property, [yet], . . . [n]otwithstanding this intent . . . chose not to invoke its condemnation powers, but, rather elected to engage in a deliberate course of conduct to force the sale of private property at reduced value", the City had constructively taken the plaintiff's property. See, also, Hernandez v. City of Lafayette, 643 F.2d 1188, 1191 (5th Cir. 1981), cert. den. 455 U.S. 907 (1982) (Allegations that city "delayed making a final decision on the rezoning of . . . property. . . so that the City's expropriation costs . . . would be kept to a minimum" sets forth a valid claim under § 1983).

The City desired to build a public project with private funds. In concept, this is arguably a worthy goal. However, it could have been accomplished other than at the expense of the Stones. One of the principal purposes of the Takings Clause is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Nollan v. California Coastal Comm'n, 483 U.S. 825, 835, n.4 (1987). The City could and should have taken the Stones Property by eminent domain, paid the Stones just compensation, and then sought developers who wished to purchase the Property from the City. If they had done so, they could have built their public project at private expense, while at the same time paying the Stones the just compensation they were due. As Justice Holmes stated in the case of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922), "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." In circumstances where the government actually requires a property owner to convey his property there is a heightened risk that the governmental purpose is avoidance of the compensation requirement rather than the stated governmental objective. Nollan v. California Coastal Comm'n, 483 U.S. at 841.

This Court stated in *dicta* in Yee v. Escondido, 503 U.S. 519, 528 (1992), that a compensable physical occupation of property could be found if the government were to set up a "gauntlet"which would "compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." If there in fact can be a "constructive" physical occupation of property, that is exactly what occurred in this

case, as the Stones were compelled to sell their property over their objection to the buyer selected by the government after the government had forced the Stones out of business which required them to sell the property.

The lower courts have split as to proper interpretation of Yee. In Golden Gate Hotel Association v. City and County of San Francisco, 864 F. Supp. 917, 923 (N.D. Cal. 1993), cert. den. ___ U.S. ___, 117 S.Ct. 51 (1996), the court, declared that a local ordinance required a landowner to pay "a king's ransom" to change the use of the land preferred by the government; citing Yee, the court found the ordinance to in effect amount to a physical invasion of the property requiring just compensation. In Cienega Gardens v. United States, 33 Fed. Cl. 196, 216 (1995), the court interpreted the Yee *dicta* as applying to situations where regulations force owners to subject their properties to a use which they neither planned nor desired. However, other courts, such as the court in The Adamson Cos. v. City of Malibu, 854 F. Supp. 1476, 1500-01 (C.D. Cal. 1994), specifically rejected the court's interpretation of the Yee dicta in the Golden Gate Hotel Association case and have declared that any governmental action which does not flatly prohibit the continuation of an existing use does not normally effect a physical taking, even if it makes it substantially more expensive to discontinue that use, because the property owner made the original choice on how to use its property.

In his concurrence in Suitum v. Tahoe Regional Planning Agency, ___ U.S. ___, 117 S. Ct. 1659, 1671 (1997), Justice Scalia noted the distinction between the issue of whether a landowner receives just compensation and the issue of whether the government restricts the use of land so severely as to amount

to a taking. He warned that "[i]f money that the government-regulator gives to the landowner can be counted on the question of whether there is a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less." (emphasis in original). Id. at 1671-1672. The Appeals Court, by relying on its conclusion that the Stones were able to sell their property to the developer at 72% of its claimed value at trial, misapplied the law exactly in the manner about which Justice Scalia warned.. App., *infra*, A7,n.6.

Even if this Court were to find that there was not a constructive physical invasion of the Stones property, it should find that a regulatory taking occurred when the Stones were prevented from selling their property to anyone other than the developers or for any purpose other than condominium use, as the City's actions interfered with a distinct investment based expectations not only relating to permitted uses of the property but also relating to their expectations that they could sell their property to a buyer of their choice or alternatively receive just compensation if the property was desired to be taken for a public purpose. Whether a constructive taking occurred by means of a physical invasion or interference with a distinct investment based expectation, it is of considerable public importance for this Court to identify the degree, if any, to which government privatization of governmental functions can ameliorate the government's responsibility to pay just compensation.

B. This Cases Raises the Important and Unanswered Question of When the Government Must Pay Full Compensation for Economic Hardships Created by the Government's Adoption and Support of Public Projects Which Are later Abandoned.

The Stones argued to the Appeals Court that the City's delay in taking the Stones' property from 1985-1992 after it announced the development of a public project on the property in 1985 and issued a special permit for its development in 1986 which it insisted remained in effect through 1992 constituted a constructive taking of the Property. The Appeals Court never even addressed this argument.[8]

While a number of lower courts have addressed the issue of when a delay or abandonment of a public project amounts to a constructive taking, the Supreme Court has never addressed this issue. The Appeals Court in this case is at one extreme, having apparently determined that no amount of delay in governmental action nor diminution in property values (short of the taking away of all economically viable use of the property) following prolonged delays in implementing governmental objectives eventually abandoned can amount to a constructive taking of property.

In Thompson v. Tualatin Hills Park And Recreation District, 496 F. Supp. 530 (D. Or. 1980), affd. 701 F.2d 99 (9th Cir.

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8. Rather, the Appeals Court erroneously stated that the Stones asserted that the city constructively took their property in two different time period (1985- 1986 and 1989-1992). App., *infra*, A2, n.3. In fact, the Stones asserted three alternative theories of constructive taking: (1) a constructive taking during 1985-1986, (2) a constructive taking during 1989-1992, and (3) a constructive taking during the entire period of 1985-1992.

1983), the court noted that a declaration of blight, redevelopment activities, the passage of time and eventual abandonment of a proposed redevelopment can so diminish property values as to amount to a constructive taking. Id. at 540. The court noted however the split in state court opinions relating to this issue, citing five state court cases in which the above scenario had been found to be a constructive taking and three cases involving "closely analogous" facts in which the state courts found no constructive taking. Id. In Thompson, the court held that there must be a substantial burden on the property rights of the owner caused by abandonment of a public project before a compensable taking can be found and the burden must be a product of governmental actions that amount to abuse of the condemnation authority. Id. at 541. The court in Thompson found no compensable taking to have occurred from the one year delay before abandonment that occurred in that case.

On the other hand, the court in Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), aff'd, 405 F.2d 138 (6th Cir. 1968) held that a de facto taking had occurred where the City commenced condemnation proceedings and kept its lis pendens in effect for five years after the urban renewal project was stopped. See, also Richmond Elks Hall Assn. v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977) (Six year delay in development of area rendered property unsaleable in the open market, severely limited uses and effected a compensable taking). While in this case, the City never formally voted to acquire the Stones' property, it did formally announce the Harborside Landing project which included the Stones' property, formally approved a special permit for the

development, continued to insist that the property could only be used for condominium development after the condominium market had "dried up", and continued to insist for seven years that the developers' special permit remained in effect and the property had to be treated as a singular 11 acre unit rendering the Stones' property unsaleable.

While constructive taking cases are always fact dependent, it is nevertheless important that the Supreme Court address the issues of what types of actions amount to an "abuse of the condemnation authority", how much of a delay is excessive, and whether a City can only abuse its condemnation authority after a formal declaration of blight, in order to offer better guidance to the lower courts and reduce the possibility of cases with "closely analogous facts" being decided differently.

C. This Case Raises the Important and Unanswered Questions of Whether a Land-owner Must Seek Administrative Review Relating to Alternative Uses for His Property After the Government Has Announced that it Plans to Utilize the Landowner's Property for a Public Improvement and Whether a Land-Taking Is Ripe for Review After One Meaningful Attempt to Obtain an Administrative Permit.

The Appeals Court declared that the Stones "failed to avail themselves of the opportunity to seek approval for the multitude of alternative uses permitted under the zoning ordinance." App., *infra*, A12. Remarkably, the Appeals Court described the "heavy industrial" zoning district in which the Stones property was located as the "least restrictive in the City" because no use was

prohibited. App., *infra*, A2, n.3. In reality, the district was the most restrictive in the City, because no use was allowed as of right except for the few uses, such as agricultural, educational, religious and public uses, which Mass. Gen. Laws c. 40A, § 3 prohibits zoning ordinances from regulating. Thus, the Appeals Court found that the Stones' constitutional case was not ripe for review because the Stones did not seek to set up a farm, a school, a religion or a government on its property located on a commercial strip in the middle of a metropolitan city.

Of significance for this Court, this case presents the issue of whether a landowner even needs to seek administrative review of possible land uses after a city has already announced that it intends to build a public project on the landowners' property. As the court stated in Picard v. Bay Area Regional Transit District, 823 F.Supp. 1519, 1524 (N.D. Cal. 1993), "[w]here the government entity, through formal announcement or action, has exhibited its intent to acquire the property for public use or benefit, however, the possible beneficial uses of the property available to the plaintiff are not
at issue" (emphasis added) and the Williamson finality requirements do not apply. This Court's declaration in Suitum, 117 S.Ct. at 1667, that finality requirements have been met when a regulation sets forth how a property may be utilized supports the conclusion urged by plaintiffs in this case that other types of governmental actions exhibiting the government's intent relating to the use of the property should also negate any requirement to seek administrative review.

The Appeals Court in this case further found that the attempt by the Stones and Kenneth Trapasso to obtain a special permit for Trapasso to allow the Stones to sell the property to Trapasso

for automobile related uses was not a meaningful attempt to obtain a permit.[9] App., *infra*, A10-A12.

In Suitum, 117 S.Ct. at 1667, n. 12, this Court declared that it did not need to reach the unresolved issue of whether to "establish a rule that a taking plaintiff need only make a single proposal and a single request for a variance to ensure the ripeness of his claim." The Circuits have reached varying conclusions relating to this issue. The Ninth Circuit in Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 405 (9th Cir. 1996) substituted the one meaningful application standard for the first prong of the ripeness test defined in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). On the other hand, the First Circuit in Gilbert v. City of Cambridge, 932 F.2d 51, 61 (1st Cir. 1991), cert. den. 502 U.S. 866 (1991), has stated that one meaningful application will ordinarily be a necessary, although not alone sufficient, precondition for invoking the futility exception and furthermore that the burden lies on the plaintiff "and any

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9 . The Appeals Court reached this conclusion despite the fact that Trapasso sought a permit to use the property for the exact same purposes for which the Stones had used the property and the City denied the permit on the merits declaring that the proposed use was "inappropriate for the area". The Appeals Court found that the Stones abandoned the application because they did not show up at a hearing. The uncontradicted evidence was that the Stones attorney was out of the country, requested that the matter be tabled to which a Ward Councillor had agreed, the decision on the petition was tabled and neither the Stones nor Trapasso were given notice of the date to which the hearing was rescheduled. Moreover, the hearing was rescheduled for a date on which the Stones' attorney was still out of the country.

reasonable doubt ought to be resolved against the party" seeking the futility exception.

If this Court were to find that the Stones needed to seek administrative review despite the City's announcement of its intention to use the Stones' property for a public purpose, this case offers the ideal vehicle for addressing the "one meaningful attempt" rule, and rejecting (1) the Appeals' Court conclusion that an attempt can be found to have been abandoned because of governmental negligence in handling the application and (2) the First Circuit's placement of a criminal "beyond a reasonable doubt" burden of proof upon the plaintiff.

D. The Appeals Court Decision That the Burden of Proof Rested on the Stones to Show That the Use Restrictions Placed on Their Land by the City of Lynn Did Not Substantially Advance Legitimate Public Interests and That the Stones Could Not Satisfy That Burden Was in Direct Conflict with the Decisions of this Court in Dolan and Nollan.

The Appeals Court plainly erred in declaring that the burden rested on the Stones to prove that the City of Lynn's application of its zoning ordinance to insist on condominium development on the Stones property did not substantially advance any legitimate public interest. *infra*, A13. The Stones challenge adjudicative decisions and arbitrary and capricious acts applying an ordinance rather than the facial validity of any ordinance. In Dolan v. City of Tigard, , 512 U.S. 374, 391, n. 8 (1994), this Court unequivocally stated that the burden of proof rests with the government to show that its actions substantially advance

legitimate state interests in challenges to the application of regulations to particular parcels of land.

After the Stones repurchased their property, the City insisted that the special permit granted the developers was still in effect. They further insisted that the entire eleven acres set aside for the Harborside Landing project must be developed as a singular project. During this time, the City did not have any other developer interested in developing the project.

The City's insistence on condominium development from 1989-1992 ran counter to all market realities. Defendant Geaney acknowledged that by 1989 the condominium market had "dried up". Rather than furthering any governmental interests, the City's stubborn insistence on condominium development resulted in the empty lots which still existed at the time of trial.

The City did not even attempt to advance an argument how its policy which left much of eleven acres along its primary roadway vacant and unutilized, when auto dealers were willing to operate on the property, even minimally advanced any legitimate governmental interest. Nor did the City advance any argument as to why it was acceptable to allow the Stones' successor to sell the property for non-condominium use with a stipulation on a special permit that the property "can be bought back or taken by eminent domain" but it was unacceptable for the Stones to sell the property for non-condominium use utilizing a similar stipulation. Rather, the City set forth nothing but the type of generalized planning goals in support of its actions which fall far short of demonstrating the needed nexus

between the condition imposed and the asserted purpose required in Nollan v. California Coastal Commn, 483 U.S. at 837.

E. The Appeals Court Decision That the Stones' Property Retained Economically Viable Uses from 1989-1992 was in Conflict with the Principles set Forth in Agins.

The Court concluded that the Stones' property retained economically viable uses from 1989-1992, because the Stones were able to rent the property (illegally without a permit covering the use) for less money per month than their monthly property tax and because the Stones had the property appraised at $400,000 (for commercial uses for which the City would not let the property be used). This Court, when it declared in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) that a taking occurs when governmental action "denies an owner economically viable use of his land" could never have meant that land generating a loss for an illegal use or that an appraisal of the land for a use not being allowed by the City rendered the land economically viable.

II. SUBSTANTIVE DUE PROCESS CLAIM

A. This Case Raises the Important and Unanswered Question, on Which the Circuit Courts are in Conflict, as to Whether Constructive Takings of Property Can Violate Substantive Due Process.

In 1992, the Sixth Circuit, reviewing a civil rights case "stemming from the routine denial of a zoning change", stated:

"[o]ur research reveals the circuits to be deeply divided concerning the theories to be employed in federal court cases challenging zoning." Noting the "remarkable" "lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious due process' category", the panel concluded:

> We wish it were within our power to harmonize these decisions but the conflicts among the circuits are too great. Harmony will have to await action by the Supreme Court.

Pearson v. City of Grand Blanc, 961 F.2d 1211, 1214, 1217, 1220n. 45 (6th Cir. 1992). See also Contreras v. City of Chicago, 119 F.3d 1286, 1294 (7th Cir. 1997)("This court has repeatedly noted the lack of instruction from the U.S. Supreme Court in [the substantive due process] area, particularly regarding cases where plaintiffs have alleged deprivations of state-created property interests.")

Among the Courts of Appeal, the First Circuit has applied the most extremely restrictive standard to substantive due process land-use regulation cases. The First Circuit will not disturb a zoning decision even where it is arbitrary and "even if it could be shown that the [government] strayed willfully from the proper ends of their governmental duties." Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 832, n. 9 (1st Cir. 1982). Bad faith refusal to follow state law does not violate due process in the First Circuit, nor does action that is arbitrary, erroneous, exceeds authority, violates state law, or is improperly motivated. Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524, 1527-1528 (1st Cir. 1983). In order to be "arbitrary and capricious" for substantive due process purposes in the First Circuit, the government's conduct must be "stunning",

"egregiously unacceptable, outrageous, or conscience shocking", Amsden v. Moran, 904 F.2d 748, 754, and n. 5 (1st Cir. 1990), cert. den. 498 U.S. 1041 (1991).

Adopting the First Circuit "shock the conscience" standard of due process scrutiny, the Appeals Court upheld the state trial court's granting of summary judgment in favor of the City on the Stones' substantive due process claims. App., *infra*, A5.

Whether or not this Court chooses this case as a vehicle for overall clarification of the law of federal substantive due process, the Appeals Court ruling cannot be allowed to stand.[10] None of the outer limits of the First Circuit's formula are drawn from this Court's land-use substantive due process cases[11] and no other circuit has so "disfavored" the doctrine.

This case offers an outstanding vehicle for deciding whether land use cases can be decided under substantive due process grounds as well as taking grounds. The City of Lynn acted arbitrarily and capriciously by knowingly enforcing a zoning ordinance it had been told was probably illegal which allowed it to discriminate and treat similar properties differently. Although

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10. Other circuits have specifically rejected the extension of the Rochin v. California, 342 U.S. 165, 172 (1952) "shock the conscience" test beyond reviews of police misconduct. In United States v. Gates, 20 F.3d 1550, 1556, n. 7 (11th Cir. 1994), the court declared that "the Rochin 'shocks the conscience' standard has no place in a civil case for money damages." See, also, Cassady v. Tackett, 938 F.2d 693, 698 (6th Cir. 1991) (Applying the 'shock the conscience' test in an area other than excessive force is problematic).

11. In Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977), this Court declared that a landowner had a "right to be free of arbitrary or irrational zoning actions."

the two projects were virtually identical in scope and purpose, the City took the Seaport Landing property by eminent domain, but refused to pay any public funds for the Harborside Landing project. Upon the failure of the Harborside condominium project and the drying up of the condominium market, the City continued to insist that the land be developed in a manner in which no-one to date has been interested in developing the property.[12]

The other circuits apply widely divergent rules and standards. The Second Circuit and Fourth Circuits apply an "arbitrary", "irrational" or "capricious" standard in reviewing substantive due process claims. Crowley v. Courville, 76 F.3d 47, 52 (2nd Cir. 1996); L.M. Everhart Construction, Inc. v. Jefferson County Planning Commission, 2 F.3d 48 (4th Cir. 1993).

The Third Circuit rejected the First Circuit's approach in Bello v. Walker, 840 F.2d 1124, 1129 (3rd Cir. 1988), adhering instead to its own "deliberate and arbitrary abuse of governmental power" test. In Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 683 (3rd Cir. 1991), cert. den. 503

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12. Moreover, it makes a considerable difference to the Stones as to which standard is applied, as the measurement of damages differ considerably under a taking standard and a due process standard. Under the taking standard, the Stones are entitled only to just compensation, which is generally measured by the fair market value of the property at the time it was taken. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 320, n. 10 (1987). On the other hand, damages for due process violations can include compensation for mental anguish and suffering. Memphis Community School Dist. v. Stachura, 477 U.S. 299, 302 and 307 (1986). Significantly, in this case, the jury awarded the Stones $400,000 in damages for their emotional distress.

U.S. 984 (1992), the court departed further from the First Circuit by affirming that "allegations that the government deliberately and arbitrarily abused its power" and that governmental actions motivated by "bias, bad faith, or improper motive", could support claims for substantive due process violations. Most recently, this circuit has restricted the protection of substantive due process to constitutionally recognized "fundamental rights" but retains its focus on the motivation behind the governmental act. Phillips v. Borough of Keyport, 107 F.3d 164, 179-180, 181 (3rd Cir. 1997), cert. den. __ U.S. __, 118 S.Ct. 336 (1997).

The Fifth Circuit is deeply divided on the standard of "arbitrary and capricious" conduct that it will apply. See South Gwinnett Venture v. Pruitt and Rockbridge Associates, Ltd., 491 F.2d 5 (5th Cir. 1974) (en banc rehearing reversing decision of panel, Wisdom and Ingraham dissenting); Shelton v. City of College Station, 754 F.2d 1251 (5th Cir. 1985)(Tate, C.J.); reversed Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986)(en banc, Tate, Rubin, Politz. Johnson, and Williams dissenting). As of December 1996, the Fifth Circuuit had developed a category of "per se" takings (physical or all economically viable use) and a very restrictive "arbitrary and capricious" standard. Texas Manufactured Housing Association, Inc. v. City of Nederland, 101 F.3d 1095, 1104, n. 6 (1996), cert. den. __ U.S. __, 1997 U.S. LEXIS 3997 (1997).

The Ninth and Tenth Circuits have adopted the view that all regulatory takings are subsumed by the Fifth Amendment. The Ninth Circuit, in an en banc decision in Armendariz v. Penman, 75 F.3d 1311, 1318-1319 (9th Cir. 1996) declared that the Fifth Amendment preempts all "taking" claims and that substantive

due process protection extends only to "deeply rooted", primarily personal, rights. However, the court, without explanation but with dissent, in Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) returned to a substantive due process, rationally related analysis.

The Eleventh Circuit rejected the First Circuit's "shocks the conscience" standard of substantive due process analysis in 1994 in McKinney v. Pate, 20 F.3d 1550, 1556, n. 7 (11th Cir. 1994) (en banc), and then adopted a fairly broad view of "arbitrary and capricious" behavior in New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (11th Cir. 1996), cert. den. 117 S.Ct. 2514 (1997). Less than a year after New Port Largo, the court endorsed the position that substantive due process taking claims are subsumed by the Fifth Amendment. Bickerstaff Clay Products Co., Inc. v. Harris County, 89 F.3d 1481 (11th cir. 1996). Unlike the Ninth Circuit, however, the Eleventh Circuit still perceives a roll for substantive due process in land-use cases as governing the rights of those who are deprived of property in actions that exceed the police powers of the state, but do not amount to a taking. Bickerstaff, at 1490; Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610, 614, n. 16 (11th Cir. 1997).

III. CIVIL RIGHTS CLAIM

A. The Appeals Court's Upholding the Granting of Summary Judgment on Plaintiffs' Claims Brought Under 42 U.S.C. § 1983 Despite the Fact that Defendants' Constructively Took Plaintiffs' Property Was in Conflict with Actions Taken By this Court in San Diego Gas and Suitum.

Whether a party can bring a constructive taking claim pursuant to 42 U.S.C. § 1983 is a related, but separate issue from whether a party can bring a substantive due process claim in land-use cases.

The Appeals Court upheld the trial court's granting of summary judgment on plaintiffs' 42 U.S.C. § 1983 claim based on First Circuit precedent. However, even if plaintiffs cannot bring an "arbitrary and capricious" claim under 42 U.S.C. § 1983, they should be allowed to bring their claim that their Fifth and Fourteenth Amendment rights to just compensation were violated under 42 U.S.C. § 1983.

As Justice Brennan stated in his dissent in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 656 n.13 (1981), a "landowner may . . . have a damage cause of action under 42 U.S.C. § 1983 for a Fourteenth Amendment due process violation . . . where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no 'public use'". In other cases, this Court has implicitly recognized that takings claims brought directly under the Fifth Amendment can also be brought under 42 U.S.C. § 1983. See Suitum v. Tahoe Regional Planning Agency, supra; see, also Hernandez v. City of

Lafayette, 643 F.2d 1188,1198 (5th Cir. 1981) (takings without just compensation are redressable under § 1983).

This issue is of far more than simply academic interest given plaintiffs' ability to recover its attorneys fees after successfully prosecuting an action under 42 U.S.C. § 1983.

Conclusion

For the reasons stated above, the petition for certiorari should be granted.

Respectfully Submitted,

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Appendix A
(Appeals Court Memorandum and Order, 9/26/97)

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

96-P-1522

HAROLD W. STONE & another[1]

vs.

CITY OF LYNN & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This appeal is the result of a consolidation of two separate actions filed by the appellees, Harold and Iris Stone. In the original action filed on November 28, 1989, the Stones sought a declaration that certain provisions of the city of Lynn's (city) zoning ordinance were invalid, as well as damages for alleged civil rights violations under G. L. c. 12, § 11I, and 42 U.S.C. § 1983, claiming that the appellant city had taken the

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[1] Iris Stone.

[2] Kevin R. Geaney.

Stones' property without just compensation.[3] In addition, the Stones sought damages from the other appellant, Kevin Geaney,

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[3] The Stones' case against the city of Lynn stemmed from their inability to sell their property for use as an automobile dealership. Their one acre locus was in a "heavy industrial" zoning district that was the least restrictive in the city, allowing educational, religious, and governmental uses and nurseries, greenhouses, and truck gardens as of right, allowing all other uses by special permit, and prohibiting no uses. After a zoning amendment in March, 1991, all "light industrial" uses were included in the "as of right" category. The Stones had operated a retail tire outlet and auto repair business on the locus under a special permit until November, 1985, when they liquidated the business and put the property up for sale, the business having failed to make a profit since "the early 80's." The Stones asserted that the city constructively took their property in two different time periods: First, from October, 1985, to July, 1986, during which the city, in October, 1985, issued a press release announcing its support for a proposal by two private developers to build high-rise residential condominium complex on an eleven acre harborside parcel that included within it the Stones' property, and the director of an economic development corporation (created as a Commonwealth instrumentality to assist in planning Lynn's economic development) told the Stones, upon their inquiry at some point in 1985, that they had to sell to the developers, as a result of which incidents the Stones asserted they were "coerced" to sell their property to the developers in July, 1986; second, from June, 1989, when the Stones repurchased the locus at a foreclosure auction (the developers having defaulted on their purchase-money mortgage to the Stones), through March, 1992, when the Stones themselves lost the property to foreclosure by their mortgage lender, during which the Stones claimed that the city "insisted" that the property be unitized for a purpose (condominium development) in which no buyers were interested and frustrated their efforts to realize greater financial gain on the property by advising potential bidders at the June, 1989, auction, through the city planner, Geaney, that the developers' November, 1986, condominium special permit was still in effect (as the city solicitor had opined) and that they should not buy the property for automobile related uses, and by denying their most probable buyer the precondition for their sale, a special permit for automobile sales use, in November, 1989.

the city planning director, for interference with advantageous relationships. After a bench trial in 1991, a Superior Court judge ruled that the city's zoning ordinance for the heavy industrial district was invalid and awarded the Stones $20,000 in counsel fees, but did not award damages on the substantive claims. On the Stones' appeal, this court, in an unpublished opinion (34 Mass. App. Ct. 1110, 3/12/93), reversed the judgment because the trial court had failed to set forth essential findings of fact and conclusions of law, and remanded the action for a new trial on the substantive claims.

In the second action, filed on November 13, 1992, the Stones alleged the same facts as in the original suit and added substantive claims, including violations of G. L. c. 93A, and intentional and negligent infliction of emotional distress.[4] After

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[4] The Stones' ultimate tortious allegations against Geaney were based upon their assertion that the city's actions which frustrated their efforts to dispose of their property were "led by" Geaney (who had no authority to make any zoning or planning decisions for the city but only to render information, status reports, opinions and recommendations relative to zoning and planning) who "consciously and deliberately" worked to prevent their selling the property, by: assisting the private developers of the residential condominium project; ignoring supposed opinions, given in 1985, and again in 1988 or 1989, that the city's "heavy industrial" zoning ordinance that required a special permit for any commercial use was probably illegal; seeking (unsuccessfully) in the spring of 1989 to have the Metropolitan District Commission close curb cuts into the Stones' property; advising a prospective purchaser's lawyer in the spring of 1989 that he would recommend against the purchaser's obtaining a special permit to operate an auto repair business and that the developers' special condominium permit was still in effect; attending the June, 1989, foreclosure auction and making similar statements to potential buyers interested in using the property for auto-related businesses; recommending denial of a special permit for an auto sales business to a potential purchaser who sought one in October,

the two actions were consolidated, another Superior Court judge granted summary judgment against the Stones on their claims for civil rights damages and violation of c. 93A. After a multi-day jury trial on the remaining claims in June, 1995, the trial judge denied motions for a directed verdict and submitted the case to the jury on special questions and instructions over several specific objections by the appellants. The jury returned a special verdict awarding the Stones $310,000 for the city's constructive taking of their property (without specifying when or how the taking had occurred), and $200,000 each to Iris and Harold Stone for Geaney's negligent infliction of emotional distress. The city and Geaney appeal from the denial of their motions for directed verdicts and judgments notwithstanding the verdict. The city argues that on this record no legal theory supports the verdict for a regulatory taking of the Stones' property and that the judge prejudicially erred in several respects in submitting the special questions and instructions. Geaney argues that there was insufficient evidence for a jury to conclude that he could be liable for negligently inflicting emotional distress on the Stones. The Stones have cross appealed, challenging the summary judgment entered against them on their civil rights claims. We affirm the summary judgments against the Stones but reverse the judgments in their favor against the city and Geaney as founded on clear errors of law.

1989, as a condition of buying the locus from the Stones; telling Mrs. Stone in the fall of 1989 that he would continue to recommend against allowing auto related businesses on the property, an opposition reiterated in February, 1992, to a member of the mayor's staff and to a paid consultant of the Stones; and telling that consultant that he "was angry at the Stones" for suing him.

A. The cross appeal. There is nothing to the Stones' contentions against the summary judgment dismissal of their claims under 42 U.S.C. § 1983, and G. L. c. 12, §§ 11I. We conclude that the arguments set forth at pages 16-19 of the reply brief for the city as cross appellee amply support affirmance of those judgments, under established principles relating to the procedural requirements for summary judgment and the substantive elements of the statutory causes of action. We emphasize, in particular, that we find entirely unpersuasive the Stones' case for rejecting the First Circuit's standard for a viable § 1983 claim (i.e., that the government action must be "egregiously unacceptable, outrageous, or conscience-shocking", Licari v. Ferruzzi, 22 F.3d 344, 347 [1st Cir. 1994]), which we have already decided to follow in land use cases. See Rosenfeld v. Board of Health of Chilmark, 27 Mass. App. Ct. 621, 627-628 (1989). Moreover, the sole evidence submitted by the Stones in opposition to the summary judgment motion against the State claim could not, by any stretch of the imagination, be construed to have demonstrated the sort of "threats, intimidation or coercion" required for liability under relevant case law. See Freeman v. Planning Bd. of W. Boylston, 419 Mass. 548, 564-566 (1995). See also Pheasant Ridge Assocs. Ltd. Partnership v. Burlington, 399 Mass. 771, 781-782 (1987); Smith v. Longmeadow, 29 Mass. App. Ct. 599, 603 (1990); Murphy v. Duxbury, 40 Mass. App. Ct. 513, 519-520 (1996). Contrast Tortora v. Inspector of Bldgs. of Tewksbury, 41 Mass. App. Ct. 120, 123 (1996).

B. The "taking" judgment. We agree with the city, substantially on the basis of the reasons and authorities set forth at pages 13-37 of its appellant's brief, that the record does not

support a finding that a regulatory taking took place at any time. The judgment against the city on the Stones' takings claims must be reversed and vacated for clear error of law by the Superior Court in: denying the city's motion for a directed verdict; erroneously refusing to submit a critical special question requested by the city designating the time periods of any taking found to have occurred; prejudicially misinstructing the jury on the city's burden of proof; and denying the city's motion for judgment notwithstanding the verdict. We summarize the errors warranting reversal:

1. The Stones' taking claim with respect to the October, 1985-July, 1986, period, not filed until November 28, 1989, was barred under any of the applicable statutes of limitations, the longest of which was three years from the "taking".[5]

2. There was no evidence from which a fact finder could rationally infer that the city, or anyone for whom the city was legally responsible, had coerced the Stones into selling to the developers in July, 1986, and no case authority comes anywhere close to suggesting that a taking could have occurred on the sparse facts presented by the Stones (see note 3, supra).

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[5] Contrary to the Stones' contentions, the city properly raised and preserved the statute of limitations defense and the statute was not tolled, since the taking claim for this time period rested on completed events, namely, the city's announced support for the private residential condominium proposal in October, 1985, and the statement by the economic development corporation director at some point in 1985 regarding the Stones' restricted sale options. Even if the Stones could validly consider the condominium special permit granted to the developers on November 18, 1986 -- four months after the Stones had sold the locus -- as part of the taking, their action was still untimely.

See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-127 (1985) (the mere assertion of regulatory jurisdiction by a government body does not constitute a regulatory taking); Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 15 (1984); Cayon v. Chicopee, 360 Mass. 606, 608-612 (1971) (mere announcements of proposed land taking for urban renewal purposes do not amount to a compensable taking).

3. There was no evidence from which a fact finder could rationally find, as the jury were instructed they could do, that the Stones had been deprived of all economically viable use of their property in the 1985-1986 period.[6]

4. There was no evidence from which a fact finder could rationally find, with respect to the 1985-1986 time period, that the Stones had any investment-based expectations, distinct or otherwise, when they acquired the locus.[7]

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[6] The Stones' 1983 special permit allowed them to continue operating their tire and repair business indefinitely had they wished to do so; or to use it for any of the "as of right" uses under the zoning ordinance; or to seek a special permit for any of the conditional uses under the ordinance. Their sale of the locus in 1986 was for $725,000, 72% of its claimed value at trial (according to their appraiser), 88% of the value set by an appraiser in January, 1985, 85% of the price which they sought to sell it for throughout 1985, and over 100% of the value set by the city's appraiser at trial. Notwithstanding these facts, the Stones persist in maintaining on appeal that the city denied them "all economically beneficial use of their property" in the 1985-1986 period, a patently frivolous argument.

[7] Distinct investment-backed expectations are established at the time a property is acquired. See Steinbergh v. Cambridge, 413 Mass. 736, 742-743 (1992). Mr. Stone's testimony was to the effect that his only intent at the time he acquired the locus in 1976 was to continue operating it as the family tire and auto repair business. He also testified that the only reason

5. There is no support in the record for the Stones' 1985-1986 taking claim founded on the city's enforcement of the zoning ordinance applicable to the locus which the city supposedly knew was illegal[8] (as the Stones argue on appeal), because the Stones did not base their taking case at trial on such a theory; did not challenge the validity of or application of the ordinance to their property during that time frame; were not in fact denied any asserted or claimed rights under the ordinance (in fact, they received desired special permits under the ordinance on both occasions that they petitioned therefor); and

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he decided to sell the assets of the business and the property in 1985, after the business had peaked "in the late 70's and early 80's", was "rumors" of the residential condominium project development, which "rumors" supposedly caused his employees and customers to defect and the business to decline beginning "in the latter part of '84". The development project was not announced until October, 1985, and Stone testified that his business had been unprofitable from the "early 80s" on.

[8] The evidence of the city's supposed knowledge of illegality was based upon the testimony of a private city planning consultant (who was not a lawyer), over objection, that he had concluded the ordinance "might" be illegal sometime in 1984 or 1985 and communicated his views at some sort of meeting with city officials. In 1990, in an amended complaint, the Stones asked for a declaration that the ordinance was invalid but did not assert the invalidity as part of their taking claims. A Superior Court Judge ruled that it was invalid after a jury-waived trial in 1991, but his conclusion was reversed by this court in 1993 for insufficient and ambiguous findings. In March, 1991, an amendment to the Lynn zoning ordinance expanded the list of uses as of right in the "heavy industrial" district to include all light manufacturing uses.

neither requested nor received an instruction on this theory of taking.[9]

6. The judge's rejection of the city's request for a special verdict form explicitly designating the time periods covered by any temporary taking, without providing specific instructions on that material issue (see note 10, infra), was clearly erroneous. See Tower v. Hirschhorn, 397 Mass. 581, 591 (1986). Given the peculiarly fact-dependent and essentially ad hoc, case-by-case factual inquiry required in any taking analysis, Steinbergh v. Cambridge, 413 Mass. 736, 741 (1992), we are definitely and firmly convinced that the judge's ruling constituted a mistake substantially prejudicing the city's case with respect to the separate, material issue of the claimed taking between July, 1989 (when the Stones reacquired the property), and 1992. That is because the jury's essentially general verdict in special question form, that the city constructively took the Stones' property at some unspecified time by some unspecified means, and awarding a single sum of $310,000 therefor, might well have been addressed to the facts related to the distinct 1985-1986 period, which, as noted above, were insufficient as matter of law to have given rise to liability for a taking. See Stone v. Orth Chevrolet Co., 284 Mass. 525, 528 (1933); Palumbo v. DiMare, 299 Mass. 212, 214-215 (1938); Wheeler v. John Deere Co., 935 F.2d 1090, 1101 (10th Cir. 1991) (when trial judge decides in his discretion to present special questions to jury, it is reversible error if he fails to include all material

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[9] The issue whether a zoning ordinance is valid is distinct from the issue whether a claim exists for damages because of an alleged taking. See Lopes v. Peabody, 417 Mass. 299, 302 n.7 (1994).

factual issues to be disposed of in the case). Cf. Commonwealth v. Plunkett, 422 Mass. 634, 635 (1996) (citing authorities for the established principle that a new trial is necessary when a general verdict is returned in a case submitted to jury on two theories of culpability, only one of which is supported by evidence).[10]

7. The Stones' claim with respect to the purported taking during the June, 1989-March, 1992, period should not have been submitted to the jury because it was not ripe. They failed to show a necessary prerequisite, namely, "that available legal processes, not yet used, [could] not eliminate the alleged taking," Wilson v. Commonwealth, 413 Mass. 352, 356 (1992), since the only special permit application ever denied during that period, submitted not by the Stones (as they could have) but by their potential buyer in October, 1989, was not seen through to a conclusion and was essentially abandoned.[11] Under the

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[10] Although questions must be viewed in light of the accompanying instructions, Draghetti v. Chmielewski, 416 Mass. 808, 818 (1994), that salutary principle does not salvage the situation, because the judge's instructions failed to distinguish the two periods of claimed takings.

[11] Not only did the potential buyer fail to advance, in his application for a special permit for an automobile sales use, a single reason why an automobile dealership would be an appropriate use of the locus under applicable zoning criteria (which was his undoubted burden); but, more fatally, neither he, his counsel, nor anyone else attended the city council hearing to support the application. That hearing had been properly noticed pursuant to the statute and scheduled for a date certain, to the knowledge of the applicant and the Stones. The hearsay testimony of the applicant and the Stones -- to the effect that they did not appear at the scheduled hearing because the applicant had, at the request of the Stones' attorney, called his "ward councilor" to request that the councilor "table that particular meeting" because of the Stones' attorney's unavailability and that the

circumstances, there was not the requisite showing that the applicant had presented a meaningful application or had taken all the actions that were provided by law for gaining permission to use their property as desired. Williamson County Regional Planning Comn. v. Hamilton Bank, 473 U.S. 172, 187-190 &

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councilor had allegedly responded that he would do so and that the applicant (who was also represented by counsel) need not show up at the scheduled meeting -- was belied by the city council records. They reveal that the meeting to consider the special permit application was formally held as originally scheduled, an abutter showed up in opposition, the application was discussed, the hearing was declared closed, and the only matter "tabled" was a decision on the matter, which was agreed to be resolved by the next meeting, which it was. The hearsay testimony about the supposed rescheduling was, in any event, neither reliable nor creditable (in our view, under our right and duty to subject a jury's determination whether a compensable taking occurred, like any other constitutional question, to independent, de novo review of the facts, see Haynes v. Washington, 373 U.S. 503, 515-516[1963]; Jacobellis v. Ohio, 378 U.S. 184, 189 [1964]), in light of the circumstances. The applicant and the Stones were represented by presumptively competent counsel, who must be deemed to have been aware of: (a) the applicant's burden to prove entitlement to a special permit; (b) the well-known principle that one cannot reasonably rely upon oral representations, even misstatements, made by a government official about procedural requirements, which cannot create an estoppel against the government, O'Blenes v. Zoning Bd. of Appeals of Lynn, 397 Mass. 555, 558-559 (1986); Harrington v. Fall River Hous. Authy., 27 Mass. App. Ct. 301, 309-310 (1989); and (c) the strict notice requirements of G. L. c. 40A, §§ 9 &11, which are jurisdictional, see Gallagher v. Bd. of Appeals of Falmouth, 351 Mass. 410, 414-415 (1966); Pelletier v. Bd. of Appeals of Leominister, 4 Mass. App. Ct. 58, 61-62 (1976), and would have required both republication and newly mailed notice to all interested individuals, including the owner of the land even though not the applicant. See Cappuccio v. Bd. of Appeals of Spencer, 398 Mass. 304, 308 (1986). We note that the city sought instructions with respect to the applicant's abandonment of his permit request, as well as related matter concerning ripeness, which the judge rejected.

n.11 (1985). Even if the denial of the potential buyer's unconsummated special permit application were deemed to be a final decision on whether an automobile dealership qualified as a permitted use under governing criteria, the Stones failed to avail themselves of the opportunity to seek approval for the multitude of alternative uses permitted under the zoning ordinance; and utterly failed to demonstrate that any such application would have been futile, as was their heavy burden.

8. The judge erred in submitting the taking claim for the July, 1989-March, 1992 period to the jury on the Stones' theory that the city had deprived them of all economically viable uses in the locus, when the Stones' own evidence showed that they were renting the property during that period for between $2500 and $3000 a month and had had it appraised as having a fair market value of over $400,000 as of 1991-1992. See Goldblatt v. Hempstead, 369 U.S. 590, 592 (1962); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 & n.8 (1992); Steinbergh v. Cambridge, supra at 741; FIC Homes of Blackstone v. Conservation Commn. of Blackstone, 41 Mass. App. Ct. 681, 689 (1996). See also the discussion in section 3, supra.

9. The judge erred to the city's prejudice in failing to give requested instructions that would have correctly conveyed to the jury, with respect to the alleged 1989-1992 taking, the applicable principles that: "investment-backed expectations" (which if unduly interfered with by government regulation may form the basis for a compensable taking) must be reasonable and not merely a unilateral subjective or speculative expectation; such expectations must be predicated on conditions existing at the time of acquisition, see FIC Homes of Blackstone, supra at

693-694; and the Stones' investment expectations could not reasonably exceed the regulatory environment, which was clear (regarding the requirement of a special permit for automobile uses) at the time they repurchased the locus in 1989.

10. The judge erred to the city's prejudice in incorrectly instructing the jury at several points that the city had the burden of establishing that the restrictions on use of the property which were claimed to have effected a taking "substantially advanced a legitimate government interest," when the law clearly places on the landowner the burden of proving that the use restriction as applied does not substantially advance legitimate public interest. Dolan v. Tigard, 512 U.S. 374, 391 n.8 (1994); Lopes v. Peabody, 417 Mass. 299, 305-307 & n.13 (1994). We are satisfied, for the reasons set forth at pages 31-34 of the appellant city's brief, that the Stones did not and could not have satisfied that burden on these facts.

C. The "negligent infliction" judgment.

1. Assuming, without deciding, that appellant Geaney acted negligently[12] and that his negligence caused[13] emotional distress to the Stones -- assumptions we seriously doubt are supported on this record -- the judge erred in submitting the

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[12] Contrary to the judge's ruling on the appellants' JNOV motions, there was no evidence presented regarding the existence of an actionable duty owed by the city planner to the Stones, whether as a public employee or an individual. See Urman v. South Boston Sav. Bank, 424 Mass. 165, 171 (1997).

[13] As city planner, Geaney had an entirely advisory function, had no regulatory or enforcement authority with respect to any aspect of the zoning ordinances, and was not the person legally or factually responsible for any of the zoning decisions that allegedly injured the Stones.

issue of Geaney's liability for negligent infliction of emotional distress to the jury. All of the allegedly injurious conduct attributed to Geaney (see note 4, supra) not only represented discretionary activity within the scope of his public employment[14], but also fell far short, as matter of law, of rising to the egregious level of impropriety required by our case law before a public official loses his common law immunity for discretionary acts and decisions. See Gildea v. Ellershaw, 363 Mass. 800, 821 (1973); Ramos v. Board of Selectmen of Nantucket, 16 Mass. App. Ct. 308, 314 (1983) (the requisite proof to negate such immunity must not "merely [show] negligence . . . [but] a dishonest purpose or some moral obliquity . . . [implying] conscious doing of wrong . . . through some motive of interest or ill will . . . partak[ing] of the nature of fraud," quoting from Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 416-417 [1937]).[15] None of the evidence comes anywhere close to intimating a dishonest or fraudulent motivation on Geaney's part (as opposed to an intense planning preoccupation with seeing the area in which the Stones'

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[14] This is the necessary implication of the judge's special verdict question 9 -- "Did Geaney, acting in the exercise of discretion, act in good faith, without malice and without corruption?" which the jury answered negatively -- which would have been superfluous if Geaney's acts were outside of the scope of his employment. Indeed, the Stones concede that Geaney's "negligent conduct" was within the scope of his employment and reflected the exercise of a discretionary function.

[15] Contrary to the judge's JNOV ruling and the Stones' argument, Geaney sufficiently preserved all of his appellate arguments, including immunity, in his motion for directed verdict. See Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 9 n.3 (1983); Dilaveris v. W.T. Rich Co., 424 Mass. 9, 10-11 (1996).

property was located developed as a residential condominium complex rather than devoted to automobile-related businesses), nor do the Stones so argue.[16]

2. The error in denying Geaney's directed verdict motion grounded on his common law immunity was compounded by the judge's instruction that Geaney had the burden of proving that he acted in good faith and without malice or corruption. To the contrary, the burden of establishing disentitlement to the immunity is entirely that of the plaintiff, see Gildea v. Ellershaw, 363 Mass. at 820; Ramos v. Board of Selectmen of Nantucket, supra at 313-314, because "[t]here is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare". Id. at 314, quoting from Foster from Gloucester, Inc. v. City Council of Gloucester, 10 Mass. App. Ct. 284, 294 (1980).[17]

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[16] The Stones make much of one incident, based upon testimony by their financial consultant that in February, 1992 -- several years after the 1989 special permit denial which Geaney recommended and which was the last act of "negligent infliction" of which the Stones accuse him -- Geaney told him that he was "angry at the Stones" for having sued him personally. Such an understandable reaction to serious litigation, coming long after the conduct claimed to create liability, hardly qualifies as indication of dishonesty, fraud or personal malice. Contrast Ramos v. Bd. of Selectmen of Nantucket, supra at 323-324, where the town superintendent of public works used threats of financial detriment amounting to coercion and possible bribery in getting the contractor plaintiff to accede to his demands.

[17] The judge reiterated his error with respect to the burden of proof in his order denying Geaney's JNOV motion. The Stones argue that Geaney did not specifically object to the judge's erroneous charge on burden of proof with respect to immunity. In fact, the judge recognized the appellant's objection to that charge and his refusal to give the correct charge regarding

D. Summary. The Supreme Judicial Court has recently reminded us

> "that government regulations 'may deprive an owner of a beneficial property use -- even the most beneficial such use -- without rendering the regulation an unconstitutional taking' . . . . 'Land use planning is not an all-or-nothing proposition. A government entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property' . . . . That an alternative, permissible use might be less profitable is not determinative."

Daddario v. Cape Cod Commn. 425 Mass. 411, 416-417 (1997). Those principles find application on the record before us, which does not support the finding that a constructive taking of the Stones' property by the city ever took place.

Accordingly, we affirm the summary judgments dismissing the plaintiffs' claims under 42 U.S.C. § 1983, and G. L. c. 12, § 11I; vacate and reverse the judgments against the city and Geaney; and remand the matter to the Superior Court for

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the plaintiffs' burden which the appellants had requested in their proposed jury instructions. (A. 1184-1185) Further, appellants' counsel did raise the issue expressly at side-bar following the instructions. (A. 1336-1337, 1339-1340) In any event, even had the issue not been properly preserved below, "[a]ppellate courts have discretion to consider [such] issues . . . where injustice might otherwise result." Scannell v. Ed. Ferreirinha & Irmao, Lda., 401 Mass. 155, 163 (1987). Squeri v. McCarrick, 32 Mass. App. Ct. 203, 204 (1992).

entry of judgment in favor of the city and Geaney on all of the plaintiffs' claims.

So ordered.

By the Court (Warner, C.J.,
Jacobs & Laurence, JJ.),
Clerk

Entered: September 26, 1997.

Appendix B
(Supreme Judicial Court Denial of Further Appellate Review, 11/25/97)

Supreme Judicial Court for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Stephen Schultz, Esquire
McGowan, Engel, Tucker, Garrett & Schultz
125 High Street
Boston, MA 02110

RE: Docket No. FAR-09436

HAROLD W. STONE & another
vs.
CITY OF LYNN & another

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied.

Jean M. Kennett, Clerk

Dated: November 25, 1997

To: Stephen Schultz, Esquire
Richard L. Vitali, Esquire
Jonathan S. Klavens, Esquire

Appendix C
(Massachusetts Superior Court Memo and Order on Motion for Partial Summary Judgment, 3/3/95)

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 92-3211

HAROLD W. STONE & another[1]

vs.

THE CITY OF LYNN & others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This action arises out of the defendants' alleged refusal to grant a special permit for property formerly owned by the plaintiffs, Harold and Iris Stone (the Stones). Two separate actions between these parties have been consolidated. In the

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[1] Iris Stone.

[2] The City Council of the City of Lynn, Massachusetts, and Kevin Geaney, as an Individual and as Planning Director of the City of Lynn.

original action (civil action no. 89-3227), the Stones sought a declaration that certain provisions of the Lynn zoning ordinance were invalid and damages under G.L. c. 12, § 11I and 42 U.S.C. § 1983, claiming that the City of Lynn had taken the Stones' property without compensation. The Stones also sought to recover from the city planning director, Kevin Geaney (Geaney), for interference with advantageous relationships. Following a bench trial, the court ruled that the zoning law in Lynn as it dealt with the heavy industrial district was invalid and awarded the Stones counsel fees in the amount of twenty thousand dollars. The Stones then appealed on the grounds that the court had erred in failing to award damages on its claims for interference with advantageous relationships, civil rights violation, and regulatory taking. The Appeals Court reversed the award of counsel fees and remanded the action for a new trial on plaintiffs' claims for G.L. c. 12, §11I, a regulatory taking, and interference with advantageous relationships, finding that the trial court had failed to set forth the essential findings of fact and conclusions of law for a review of its decision on these claims.

In the second action (civil action no. 92-3211), the Stones allege contempt of court for failing to obey the order of the trial court in the original action (Count I); regulatory taking (Counts II, III, VII); violations of G.L. c. 12, § 11I and 42 U.S.C. § 1983 (Counts IV, V, VI); interference with contractual relations (Count VIII); violations of G.L. c. 93A (Count IX); and intentional and negligent infliction of emotional distress (Counts X, XI). The defendants now move for summary judgment on all counts except those for interference with contractual relations (Count VIII), and infliction of emotional distress (Counts X, XI).

For the reasons set forth below the defendants' motion for summary judgment is **ALLOWED** in part and **DENIED** in part.

BACKGROUND

The undisputed facts, taken in a light most favorable to the Stones as the non-moving parties, may be summarized as follows: The Stones are the former owners of real property situated at 260, 270 and 276 Lynnway, Lynn, Massachusetts (the property). In 1978, the City of Lynn decided to develop a part of the City's waterfront which included the Stones' property. The development was to be for mixed residential and commercial use. In the center of the development, the City proposed developing an area to be known as Heritage State Park. To the east of Heritage State Park, the City proposed a condominium development with limited commercial use, to be called Seaport Landing. The City also proposed another condominium development with limited commercial use to the south of Heritage State Park, to be called Harborside Landing. The latter development was to encompass eleven acres, one acre of which was owned by the Stones.

In approximately 1981 or 1982, the City exercised its power of eminent domain to acquire the property on which Seaport Landing and Heritage State Park were to be built. Private developers, Paul Varadian (Varadian) and Irwin Nebelkopf (Nebelkopf), were selected to construct the Seaport Landing development, the residential portion of which was completed in approximately 1985. The City began reviewing plans for the Harborside Landing development in 1983 and 1984. On October 2, 1985, a press conference was held,

announcing the plans for Harborside Landing and that Varadian and Nebelkopf had been selected to develop the site. Plans for the development of Harborside Landing were displayed in the City Hall from 1985 through 1988.

Until the Fall of 1985, Harold Stone (Stone) operated a retail tire store and automobile repair service on the property, known as Ben's Tire. The property was located in a district zoned "heavy industrial." In 1983, Stone obtained a special permit to operate an automotive repair shop and to store flammables. Stone asserts that his business began to decline in 1984, in part due to the City's announcement that the property was to be part of the Harborside Landing project. On November 5, 1985, Stone sold the assets of the business and Ben's Tire ceased operation. Because the business's debts exceeded the amount Stone received from the sale of assets, the Stones decided to sell the property.

The Stones engaged a real estate broker, who appraised the value of the property at $835,000. This broker identified Nebelkopf and Varadian as the only potential buyers. The Stones rejected their offer because it was substantially below the appraised value. The Stones engaged a different broker who also identified Nebelkopf and Varadian as the only potential buyers. The Stones refused their offer of $400,000. On July 24, 1986, the Stones sold the property to Nebelkopf and Varadian for $725,000, taking back a second mortgage for $325,000.

From 1971 until January 3, 1991, the Lynn zoning ordinance provided that only the following uses were permitted as of right in a heavy industrial zone: farms, nursery and truck gardens, greenhouses, churches, schools, and public buildings. City of Lynn Zone Ordinance tbl. 4.4. All other uses were

permitted only upon obtaining a special permit from the Lynn City Council. Subsequent to purchasing the property from the Stones, on November 18, 1986, Nebelkopf obtained a special permit from the City Council, permitting Harborside Landing to be developed for residential use and allowing the construction of buildings in excess of height restrictions.

Despite obtaining approval, Nebelkopf and Varadian never began development of the Harborside Landing project because of the dramatic decline in the real estate market in the late 1980s. Nebelkopf and Varadian defaulted on the mortgage to the Stones, and the Stones instituted foreclosure proceedings. Before the foreclosure sale, the Stones entered a purchase and sale agreement with Morton Grossman, who agreed to purchase the property for $890,000. The agreement was contingent on Grossman's ability to obtain a special permit to operate an automobile repair/sale related business on the property. Grossman met with City Planning Director Geaney and was informed that Geaney would recommend that the City Council deny a special permit to Grossman. Grossman thereafter terminated the purchase and sale agreement.

In June 1989, the Stones reacquired the property at foreclosure. On August 16, 1989, the Stones entered into a purchase and sale agreement with Kenneth Trapasso, a used car dealer, who agreed to purchase the property for $920,000. The agreement was contingent upon Trapasso's obtaining a special permit to operate a car dealership and repair shop on the property within thirty days. On October 10, 1989, the City Solicitor advised the City Council that it could not consider Trapasso's application for a special permit because the Council had previously granted a special permit for residential use for the

property. The Solicitor stated that the effective date of the prior permit had been suspended pending the outcome of an appeal taken by abutters to the property.[3] On October 10, 1989, the City Council held a public hearing at which no one appeared in support of the application. On November 2, 1989, the City council unanimously denied Trapasso's application. The Stones themselves never applied to the City Council for a special permit.

On November 28, 1989, the Stones filed a complaint (civil action no. 89-3227). On January 14, 1991, the trial judge entered judgment in the Stone's favor, declaring the Lynn zoning ordinance invalid, and awarding the Stones attorney fees but no damages. In 1991, the zoning ordinance was amended to permit, in addition to the previously permitted uses, light manufacturing in areas zoned heavy industrial. All other uses still required a special permit from the City Council.

After reacquiring the property at foreclosure, the Stones continued to try to secure a buyer for the property. Stone asserts that he and his wife contacted 45 potential buyers and 14 real estate brokers in 1991. Despite these efforts, the Stones maintain that they have been unable to locate a buyer for the property. In late 1991, the Stones retained Anthony Caruso as a consultant with respect to their efforts to sell the property. Caruso states that Geaney informed him that he (Geaney) wanted the property used for retail, office, or residential use and would recommend denying any application for a special permit

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[3] The records of the Lynn City Clerk, submitted by defendants, contain a certification of the City Clerk stating that the period to appeal the grant of the special permit to Nebelkopf had elapsed and no appeal had been filed.

for automobile-related uses. In early 1992, Robert Walsh made inquiries about the property with a view toward operating a gas station or oil business on the site. Walsh states he discussed this with Geaney who told Walsh he would not recommend such a use to the City Council.

On March 16, 1992, First Colonial Bank foreclosed on the Stones' mortgage. The Bank obtained a deficiency judgment against the Stones in the amount of $390,284.72. On November 10, 1992, the City Council unanimously approved the application of Richard Brahm and Shirley Sarpi-Brahm for a special permit to operate an imports and antique furniture business on the property.

Before the Bank foreclosed, the Stones rented the property for $2,500 to $3,000 per month. The Stones have produced assessments indicating that the real estate taxes for the property for 1990 and 1991 were nearly $30,000.

DISCUSSION

Contempt (Count I)

The judgment issued by the trial court in the original action provided:

> It is hereby ORDERED and ADJUDGED:
> that the zoning by law in Lynn, as it deals with the heavy industrial district, be and hereby is deemed
> INVALID . . .

The Stones contend that the defendants are in contempt of this judgment because the City's policies with respect to heavy

industrial zoning have not changed, and the City's 1991 amendment was a "a sham revision."[sic]

"Civil contempt is found where there is a clear and undoubted disobedience of a clear and unequivocal command." Allen v. School Committee of Boston, 400 Mass. 193, 194 (1990). The judgment at issue here does not command the defendants to do anything or to refrain from doing anything. The judgment simply declares the zoning ordinance invalid. It does not command the defendants to enact any particular ordinance to replace the invalid one, nor does it command them to permit any particular use of the property. The judgment would provide grounds to challenge any attempted enforcement of the invalid ordinance. Likewise, if, as the Stones assert, the amendment was a mere sham, anyone denied a permit under the amended ordinance could challenge the decision on the basis that it is invalid for the same reasons the previous ordinance was declared invalid. The judgment does not, however, issue a "clear and unequivocal command" to the City Council.

Because the judgment does not command the defendants to do or refrain from doing anything, they cannot be in contempt of that order. Accordingly, summary judgment shall be **ALLOWED** on Count I.

Regulatory Takings (Counts II, III)

Failure to Exhaust Administrative Remedies

The defendants argue that the Stones' taking claims are barred because the Stones did not apply for a special permit after the residential use permit was issued to Nebelkopf. Generally, land use regulations may not be challenged as takings if the landowner has not pursued an administrative remedy that might obviate the alleged taking. Wilson v. Commonwealth,

413 Mass. 352, 356 (1992). The First Circuit, however, following the lead of the Ninth Circuit, has adopted a narrow "futility exception" to this rule. Gilbert v. Cambridge, 932 F.2d 51, 61 (1st Cir.), cert. denied, 502 U.S. 866 (1991); see also Kinzli v. Santa Cruz, 818 F.2d 1449, 1455 (9th Cir. 1987), cert. denied, 484 U.S. 1043 (1988). Thus, the failure to exhaust administrative remedies may be excused where "the granting authority has dug in its heels and made it transparently clear that the permit, application or no, will not be forthcoming." Gilbert, 932 F.2d at 61. This exception is very narrow: A mere possibility or even probability that the permit would be denied is insufficient; the denial must be a near inevitability. Id. Moreover, the First Circuit will not apply the exceptions unless at least one meaningful application has been made and denied. Id.

The burden of proof is on the party seeking to invoke the futility exception. Id. To be entitled to summary judgment, therefore, the defendants must either affirmatively negate that the Stones will be able to prove the applicability of the futility exception or demonstrate that such proof "is unlikely to be forthcoming at trial." Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991). The Stones have established that they may be able to prove that the denial of any application was a near certainty. Geaney informed at least one potential buyer (Grossman) that he would not recommend granting a permit for automobile related uses. Geaney further stated to Caruso that he wanted the property used for retail, office, or residential use only. Robert Walsh stated that, as city planner, Geaney's recommendation would be given great weight by the City Council. Taken together, this evidence indicates the Stones

may be able to establish at trial that any permit application would have been denied.

Furthermore, the requirement of one meaningful application has been satisfied. While the Stones did not apply for a permit, Kenneth Trapasso, the potential buyer, did. Since the Stones were seeking to sell the property, it is logical that they themselves would not apply, but that prospective buyers would. Trapasso did make a meaningful application, and it was denied.

Accordingly, summary judgment shall not be granted on the basis that the Stones failed to exhaust administrative remedies.

Regulatory Taking

A zoning ordinance may constitute a regulatory taking if it: (1) compels the owner to suffer a physical invasion of the property; or (2) "denies all economically beneficial or productive use of land." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992). The defendants argue that the Stones' land has not been deprived of all economically beneficial use, as evidenced by the operation of Ben's Tire until 1985, the sale to Nebelkopf, and the rental of the property. "Although economically beneficial use" has not been defined by the Supreme Court, the Supreme Judicial Court has indicated that it is not necessary that property be completely valueless to have been deprived of economically beneficial use. Lopes v. Peabody, 417 Mass. 299, 304 n.9 (1994). Whether there is any economically beneficial use to the property implicates a genuine issue of material fact. Stone asserts that he was unable to sell the property, despite diligent and exhaustive efforts. Stone also states that the property taxes and maintenance expenses

exceeded any rental income. The factfinder must resolve these issues and determine whether the zoning ordinance deprived the property of all economically beneficial use.[4]

Accordingly, summary judgment shall be denied on Counts II and III.

Violations of 42 U.S.C. § 1983 (Counts V, VI, VII)

The Stones assert that the defendants violated their constitutional rights of procedural and substantive due process.[5] The First Circuit has consistently held that administrative agencies' decisions with respect to land use and zoning only rarely rise to the level of constitutional violations. Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 40, 45 (1st

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[4] Likewise, there are genuine issues of material fact as to whether the regulation has interfered with Stones' investment-backed expectations. See Steinberg v. Cambridge, 413 Mass. 736, 742 (1992), cert. denied, 113 S. Ct. 2338 (1993).

[5] In Count V, the Stones generically assert that the defendants interfered with the exercise and enjoyment of their rights secured under the federal constitution. In Count VI, the Stones allege that the defendants, acting under color of state law, denied their rights and privileges secured under the constitution, in violation of 42 U.S.C. § 1983. The complaint does not specify which constitutional rights were denied. In Count VII, the Stones allege that the defendants' conduct constitutes "overreaching and arbitrary and capricious actions in violation of United States and Massachusetts law." In their opposition to this motion for summary judgment, the Stones characterize their constitutional claims as the rights to "procedural due process, substantive due process, [and] to be free from arbitrary and capricious taking of their property." Stone's Opposition at 16. To the extent that this last claim is an assertion that the defendants made an unconstitutional taking of their property, these claims are addressed in Section II, ante. Otherwise, this court assumes this is merely a restatement of the substantive due process claim and shall be addressed in Section IV.B., infra.

Cir. 1992); PFZ Properties, Inc. v. Rodriquez, 928 F. 2d 28, 31-32 (1st Cir. 1991); Amsden v. Moran, 904 F.2d 748, 757 (1st Cir. 1990); Raskiewicz v. New Boston, 754 F.2d 38, 43-44 (1st Cir.), cert. denied, 474 U.S. 845 (1985); Alton Land Trust v. Alton, 745 F.2d 730, 732 (1st Cir. 1984); Chiplin Enterprises, Inc. v. Lebanon, 712 F.2d 1524, 1526-1528 (1st Cir. 1983). Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1982). But see Roy v. Augusta, 712 F.2d 1517, 1523-1524 (1st Cir. 1983) (although adequate procedures available, constitutional rights implicated where defendants acted in derogation of those procedures and subverted procedural protections). The Massachusetts Appeals Court has adopted the First Circuit's prevailing approach. See Rosenfield v. Board of Health of Chilmark, 27 Mass. App. Ct. 621, 627-628 (1989) (arbitrary misapplication of state law does not establish due process claim; ordinarily administrative land use or zoning decisions do not present constitutional violations).

Procedural Due Process

To state a claim of violation of procedural due process, a plaintiff must show: "(1) that it had a property interest defined by state law and (2) that defendants, acting under color of state law, deprived it of that interest without adequate process." Licari v. Ferruzzi, 22 F.3d 344, 347 (1st Cir. 1994). To establish the first element, the plaintiffs must prove that they have a legitimate claim of entitlement to the permit they seek. Rosenfield, 27 Mass. App. Ct. at 627. The greater the discretion vested to the granting authority, the less likely that there is a property interest. Id.; see also Medina v. Rudman, 545 F. 2d, 244, 250-251 (1st Cir. 1976), cert. denied, 434 U.S. 891 (1977) (no property interest in license that could be issued

at will of granting authority). Compare Littlefield v. Alton, 785 F.2d 596, 601 (8th Cir. 1986) (property interest found where issuance of building permit mandatory upon satisfying certain prerequisites). In the present case, the Lynn Zoning ordinance vested broad discretion in the City Council to grant or deny special permits for heavy industrial zones. Thus, it is doubtful that the Stones had a property interest with respect to either the issuance of a special permit to Nebelkopf or the denial of a permit to prospective buyers of their property.[6]

Assuming arguendo that the Stones had a property interest, their claim of a violation of due process fails because any such interest was not deprived without adequate process of law. The Stones were provided both notice and an opportunity to be heard regarding Nebelkopf's petition and any prospective buyer's application. Furthermore, judicial review of such decisions was available. Court have consistently held that this is sufficient to satisfy minimal due process requirements. See, e.g., Licari, 22 F.3d at 347; Nestor Colon, 964 F.2d at 40; PFZ Properties, 928 F.2d at 31; Raskiewicz, 754 F.2d at 44; Althon Land Trust, 745 F.2d at 732; Roy, 712 F.2d at 1523; Creative Environmetns, 680 F.2d at 831-832. Where state procedures are not fundamentally flawed, there is no procedural due process

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[6] The Stones certainly enjoyed a property interest in their real estate and in maintaining some economically beneficial use to that property. Any deprivation of that interest, however, is remediable, if at all, by the Stones' claims of an unconstitutional regulatory taking. The Stones' claims of due process violations are limited to the acts of the defendants in granting Nebelkopf's permit application and their refusal to consider applications for non-residential or commercial use permits. Cf. Chiplin Enterprises, 712 F.2d at 1526 (constitutional violation, if any, resulted from denial of permit application, not from five-year delay during appeal of that decision).

violation. Rosenfield, 27 Mass. App. Ct. at 628. On the undisputed facts in this case, there has been no violation of the Stones' right to procedural due process.

Substantive Due Process

Whereas procedural due process guarantees that the procedures used to deprive one of a property interest are fair, substantive due process guarantees that state action is not arbitrary or capricious. Licari, 22 F.3d at 347. "Even bad-faith violations of state law are not necessarily tantamount to unconstitutional deprivations of due process." Amsden, 904 F.2d at 757; accord PFZ Properties, Inc., 928 F.2d at 32 (even if permit approval based on considerations outside granting authority's scope of jurisdiction, this alone does not rise to a constitutional violation); Chiplin Enterprises, 712 F.2d at 1528 (bad faith refusal to follow state law does not amount to a constitutional deprivation); Creative Environments, 680 F.2d at 831 (distortion of statutory and regulatory scheme or arbitrary misapplication of the law by granting authority does not state constitutional claim). To state a claim of a due process violation, a plaintiff must establish that there was conduct so egregious that it shocks the conscience. Rosenfield, 27 Mass. App. Ct. at 628; accord Licari, 22 F.3d at 347 (state action must "egregiously unacceptable, outrageous, or conscience-shocking"). "We have left the door slightly ajar for federal relief in truly horrendous situations. But this circuit's precedent makes clear that the threshold for establishing the requisite 'abuse of government power' is a high one indeed." Nestor Colon, 964 F.2d at 45.

Measured against this standard, it is clear that the present case does not set forth a claim for a violation of

substantive due process. Viewing the facts in a light most favorable to the Stones, the defendants clearly acted to discourage any uses on the property other than the development of Harborside Landing. Nevertheless, even if they did so in bad faith, for improper motive, or by a distortion of the land use scheme, this simply is not cognizable as a constitutional violation.

The Stones assert that this case is analogous to Roy v. Augusta, in which the court found that a license granting authority's actions did rise to a constitutional dimension. In Roy, the plaintiff applied for the renewal of his license to operate a pool hall. He appealed, prevailed, and in accord with the instructions of the Maine Supreme Judicial Court, the superior court ordered the board to issue the license to the plaintiff. Roy, 712 F.2d at 1519. The board finally issued the one-year license for which the plaintiff had originally applied, but by that time the license had expired. In the meantime, the plaintiff's property was foreclosed due to his inability to operate the business. Id. The court stated that the board "flouted" the court's order by issuing an expired license and thereby nullified the due process afforded by the state. Id. at 1523-1524.

The Stones argue that the defendants in this case likewise "ignored the spirit of" Judge Ronan's order . This argument fails for two reasons. First, as discussed in Section I, supra, the judgment in the original case did not order the defendants to do anything. Even if, as the Stones assert, the City's amendment of the zoning ordinance was a mere sham, the decision of neither the trial court nor the Appeals Court required the City to allow automobile-related uses as of right in heavy industrial zones. Moreover, the defendants' actions with respect

to the trial court's judgment did not deprive the Stones of any constitutional rights. In Roy, the court concluded that the defendants' conduct nullified the due process protections afforded by the state. The same is not true in this case. The Stones could have sought judicial review of the amended zoning ordinance as vesting too much discretion in the City Council. Judicial review of the City Council's decision to grant Nebelkopf's application and to deny Trapasso's application was also available.

Summary judgment shall be allowed on Counts V, VI, and VII.

Violations of G.L.c. 12, § 11H, 11I (Count IV)

General Law chapter 12, § 11I imposes liability on any person who interferes by threats, intimidation, or coercion with another's exercise or enjoyment of rights secured by the constitution or laws of Massachusetts. The Stones' assertion that the defendants, by refusing to grant potential buyers permits for non-residential use, coerced the Stones into doing something they were not otherwise legally obliged to do, namely, selling their property to the developers Varadian and Nebelkopf, does not make out the defendants' liability under G.L.c. 12, §11I); See Pheasant Ridge Associates Limited Partnership v. Burlington, 399 Mass. 771, 781 (1987) (wrongful taking of property, even when done in bad faith, or statements by town officials that they would take any action to stop the plaintiff's development did not amount to "threats, intimidation or coercion" under G. L. c. § 11I); cf. Bell v. Mazza, 394 Mass. 176, 179, 182-184 (1985) (where plaintiff alleged, inter alia, that defendant stated he had "connections" and would do "anything," "at any cost" to thwart plaintiff's construction plans, complaint

sufficiently recited "threats, intimidation, or coercion" to survive motion to dismiss). Accordingly, summary judgment shall be allowed on Count IV.

Violations of G.L. c. 93A (Count IX)

At oral argument, the plaintiffs correctly conceded that their action against the City based on G. L. c. 93A, § 11 cannot be maintained. Chapter 93A provides a remedy for one injured by the unfair and deceptive acts of a person engaged in trade or commerce. "Trade" and "commerce" are defined as "the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, any security . . . and any other article, commodity, or thing of value . . . ." G.L. c. 93A, § 1(b).

Chapter 93A was "intended to refer specifically to individuals acting in a business context." Lantner v. Carson, 374 Mass. 606, 611 (1978). To determine whether a party acted in a business context, the court will consider the nature of he transaction, the character of the parties involved, the activities engaged in by the parties, and whether the transaction was motivated by business or personal reasons. Begelfar v. Najarian, 381 Mass. 177, 191 (1980).

The defendants in this case were not acting in a business context. They were not engaged in the sale, rent, or distribution of any property or other enumerated item. Rather, as agents of the municipality, they were merely making decisions on whether to issue or deny special permits under the zoning ordinance. The defendants did not obtain a profit from these activities, which were incidental to the defendants' primary duties on behalf of the city. See All Seasons Services, Inc. v.

Commissioner of Health & Hospitals of Boston, 416 Mass. 269, 271-272 (1993) (concluding charitable hospital's solicitation of bids for food service contractor was not subject to G.L. c. 93A). Because the defendants were not engaged in trade or commerce, nor were they acting in a business context, the conduct at issue in this case is not within the scope of chapter 93A.

Accordingly, summary judgment shall be allowed as to Count IX.

ORDER

For the foregoing reasons, the defendants' motion for summary judgment shall be **ALLOWED** as to Counts I, IV, V, VI, VII and IX and shall be **DENIED** as to Counts II and III.

Joseph A. Grasso, Jr.
Justice of the Superior Court

DATED: March 3, 1995

Appendix D
(Massachusetts Superior Court Order on Defendants Motion for JNOV, 3/11/96)

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 92-3211
89-3227

HAROLD W. STONE AND IRIS STONE,
Plaintiffs

vs.

CITY OF LYNN, et al,
Defendants

ORDER ON DEFENDANT CITY OF LYNN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The parties are before the Court on the City of Lynn's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial or for remittitur pursuant to Mass. Rules Civil Procedure 50(b).

BACKGROUND

This case arises out of damages that Harold W. and Iris Stone claim to have suffered as a result of a zoning ordinance enacted by the City of Lynn. The Stones owned property on the Lynnway which was part of a larger area that the City decided

to develop into the "Harborside Landing Project." The City enforced a zoning ordinance which required all prospective users of property in the area slated for development to obtain a special permit. The purpose of the zoning ordinance was to prevent any owner from alienating his property to anyone other than the developer selected by the City of Lynn.

During the trial, the Stones presented two different theories on which the jury could have found a constructive taking during the period of October 2, 1985 through June 24, 1986, and three different theories on which the jury could have found a constructive taking during the period of July 11, 1989 through March 13, 1992.

In July, 1985, the Stones, prevented from selling their property to anyone else, sold their property at a depressed price to the developer selected by the City.

In November, 1989, the Stones brought suit alleging interference with prospective contractual relationships. The trial judge (Ronan, J.) held that the zoning ordinance was illegal but found no damages. The Stones appealed the no damages award and the Appeals Court remanded the case for a new trial. The Stones filed a second claim for infliction of emotional distress because the City continued to enforse (sic) the illegal zoning ordinance. In November, 1994, a judge of the Superior Court (Grasso, J.) consolidated the two cases and set them for trial.

A jury in this case awarded the plaintiffs $310,000 as damages for the "taking."

There was sufficient evidence presented from which a jury could have found that a constructive taking occurred during the period of October 2, 1985 through June 24, 1986, and that the taking substantially impacted the Stones investment back

expectations. Furthermore, there was sufficient evidence produced from which the jury could have concluded that the City's action deprived the Stones of all economically benificial (sic) use of their property. The jury was also presented with sufficient evidence from which they could have found that a constructive taking occurred during the period of July 11, 1989 through March 13, 1992. There was ample evidence from which the jury could have concluded that the City's actions did not substantially advance governmental interests and that the City's actions substantially affected the Stones property and interfered with their distinct investment expectations. Moreover, there was sufficient evidence presented from which the jury could have concluded that the City of Lynn's actions deprived that Stones' of all economically beneficial use of their property.

Finally, I am not persuaded that a remittitur would result in justice in this case. On the contrary, the Stones presented evidence that they suffered economic damages of $635,175 from the first taking of their property and $869,468 from the second taking of their property for a total of $1,504,643 in damages. The jury awarded the Stones only $310,000 in damages.

CONCLUSION AND ORDER

For the reasons stated above, the City of Lynn's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur are DENIED.

Charles M. Grabau
Regional Administrative Justice

Date: March 11, 1996

Appendix E
(Constitutional Provisions, Statutes and Regulations)

U.S. CONSTITUTION, AMENDMENT 14

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or Property, without due Process of law; nor deny to any person within its jurisdiction the equal Protection of the laws.

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Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act

of Congress applicable exclusively to District of Columbia shall be considered to be a statute of the District of Columbia.

CITY OF LYNN ZONING ORDINANCE (THROUGH MAY 9, 1989)

SECTION 4. USE REGULATIONS

4.1 APPLICABILITY

Except as provided in the Zoning Act or in this ordinance, no building, structure, waterbody, or lot shall be used in any district except for the purposes set forth in Section 4 Table of Use Regulations. Any use not listed shall be construed to be prohibited. The Building Commissioner shall make all determinations as to the applicability of a use in all districts, appeals to the Building Commissioner's determinations shall be made to the Board of Appeals.

4.2 GENERAL PROVISIONS

In Section 4 Table of Use Regulations the uses permitted by right in the district are designated by the letter (P). Uses designated by the symbol (-) shall not be permitted in the district. Those uses that may be permitted by special permit are designated by (SP). All special permits are granted by the City Council unless otherwise specified. All

special permits shall be processed in accordance with Section 12.

Existing and future uses of land, buildings or structures shall be allocated among the categories set forth in Section 4, Table of Use Regulations. Each use set forth in the principal use column of such table shall be defined by reference to the Subsection of Section 5 appearing next to such principal use and shall be subject to conditions as may be set forth therein and in such Subsection.

4.3 OTHER REGULATIONS

Uses permitted by right or by special permit shall be subject, in addition to use regulations, to all other provisions of this Ordinance.

4.4 TABLE OF USE REGULATIONS

Reference	Use	Residential Zones R1	R2	R3	R4	R5	Business Zones B3	B	CBD	Industrial Zones LI	HI
5.1.1	One family detached house	P	P	P	P	P	SP	SP	SP	SP	SP
5.1.2	Two family house	-	P	P	P	P	SP	SP	SP	SP	SP
5.1.3	Boarding house or lodging house	-	-	-	-	-	SP	SP	SP	SP	SP
5.1.4	Group residence (5)	SP	SP	SP	SP	SP	SP	SP	SP	SP	SP
5.1.5	Row house	-	-	P	P	P	SP	SP	SP	SP	SP
5.1.6	Apartment house	-	-	P	P	P	SP	SP	SP	SP	SP

Reference	Use	Residential Zones R1	R2	R3	R4	R5	Business Zones B3	B	CBD	Industrial Zones LI	HI
5.1.7	Multi-family residential high rise	-	-	-	-	SP	SP	SP	SP	SP	SP
5.1.8	Yard or garage sales (3)	P	P	P	P	P	-	-	-	-	-
AGRICULTURE											
5.2.1	Farm	P	P	P	P	P	P	P	P	P	P
5.2.2	Nurseries and truck gardens	P	P	P	P	P	P	P	P	P	P
5.2.3	Greenhouses	P	P	P	P	P	P	P	P	P	P
5.2.4	Commercial Greenhouse	SP	SP	SP	SP	SP	SP	SP	SP	SP	SP
5.2.5	Open Air Stand	SP	SP	SP	SP	SP	SP	SP	SP	SP	SP

Reference Use		Residential Zones					Business Zones			Industrial Zones	
		R1	R2	R3	R4	R5	B3	B	CBD	LI	HI
5.2.6	Poultry or fowl preparation	SP	SP	SP	SP	SP	SP	SP	SP	SP	SP
INSTITUTIONAL											
5.3.1	Churches and/or parish houses	P	P	P	P	P	P	P	P	P	P
5.3.2	Schools	P	P	P	P	P	P	P	P	P	P
5.3.3	Public Libraries or museums	P	P	P	P	P	P	P	P	SP	SP
5.3.4	Hospitals and nursing homes (2)	SP	SP	SP	SP	SP	SP	SP	SP	SP	SP
5.3.5	Philanthropic institutions	SP	SP	SP	SP	SP	SP	SP	SP	SP	SP
5.3.6	Cemetery	SP	SP	SP	SP	SP	SP	SP	SP	SP	SP

Reference	Use	Residential Zones R1	R2	R3	R4	R5	Business Zones B3	B	CBD	Industrial Zones LI	HI
5.3.7	Funeral Homes (1)	SP	SP	SP	SP	SP	SP	SP	SP	SP	SP
5.3.8	Private Clubs not for profit	P	P	P	P	P	SP	SP	SP	SP	SP
5.3.9	Public build-ings	P	P	P	P	P	P	P	P	P	P
5.3. 10	Tele-phone Ex-change	-	SP	SP	SP	SP	SP	SP	SP	SP	SP
BUSINESS											
5.4.1	Retail stores	-	-	-	-	-	-	P	P	SP	SP
5.4.2	Retail trade custom work shop	-	-	-	-	-	-	P	P	SP	SP
5.4.3	Pro-fess-ional Offices	-	-	-	-	-	P	P	P	SP	SP
5.4.4	Clinic	-	-	-	-	-	SP	P	P	SP	SP

Reference	Use	Residential Zones R1	R2	R3	R4	R5	Business Zones B3	B	CBD	Industrial Zones LI	HI
5.4.5	General Offices	-	-	-	-	-	SP (4)	P	P	SP	SP
5.4.6	Banks	-	-	-	-	-	SP	P	P	SP	SP
5.4.7	Banks with drive-in facilities	-	-	-	-	-	-	P	P	SP	SP
5.4.8	Food Service Establishment	-	-	-	-	-	-	SP	SP	SP	SP
5.4.9	Places of assembly for private recreation	-	-	-	-	-	-	SP	SP	SP	SP
5.4.10	Gasoline and oil filling stations	-	-	-	-	-	-	SP	SP	SP	SP

Reference	Use	Residential Zones R1	R2	R3	R4	R5	Business Zones B3	B	CBD	Industrial Zones LI	HI
5.4.11	Sales room for motor vehicles	-	-	-	-	-	-	P	P	SP	SP
5.4.12	Hotels	-	SP	SP	SP	SP	-	SP	SP	SP	SP
INDUSTRIAL											
5.5.1	Fuel Storage	-	-	-	-	-	-	-	-	SP	SP
5.5.2	Construction yard storage yard	-	-	-	-	-	-	-	-	SP	SP
5.5.3	Shoe factories	-	-	-	-	-	-	-	-	SP	SP
5.5.4	Auto body shop	-	-	-	-	-	-	-	-	SP	SP
5.5.5	Ice establishment	-	-	-	-	-	-	-	-	SP	SP

Reference	Use	Residential Zones R1	R2	R3	R4	R5	Business Zones B3	B	CBD	Industrial Zones LI	HI
5.5.6	Light manu-factur-ing	-	-	-	-	-	-	-	-	SP	SP
5.5.7	Heavy manu-factur-ing	-	-	-	-	-	-	-	-	SP	SP

FOOTNOTES

(1) Special permit required from Board of Appeals

(2) Special permit required from the City Council for all new projects or additions and expansions to existing facilities

(3) Yard or garage sales require a permit from the City Council Committee on Licenses

(4) General offices which shall be limited to offices used for one or more of the following uses subject to the granting of a special permit from the City Council in accordance with Section 12:

Banks and financial institutions
Real Estate

Insurance
Medical or dental clinics with out-patient services only

(5) Those requirements and restrictions relative to bulk and height of structure, yard sizes, set backs, open space and building coverage as are presently applicable to a single residence.